

# Recent Developments

## Forthcoming Changes in the *Shari'ah* Compliance Regime for Islamic Finance. By Scott R. Anderson

### I. INTRODUCTION

Three decades ago, many saw Islamic finance as something of an oxymoron. Religious prohibitions on the collection of interest (*riba*) and speculative investment (*gharar*) seemed to stand in clear tension with modern economic practices, limiting Muslim consumers' ability to engage in worldwide financial markets.<sup>1</sup> But subsequent years of innovation have yielded financial instruments and services that are able to reproduce many of the benefits of conventional finance without violating the tenets of Islamic law, or *shari'ah*.<sup>2</sup> Increasingly popular among Muslim and non-Muslim issuers alike, these Islamic financial products are estimated to be worth as much as \$822 billion worldwide, making them a significant part of the global financial system.<sup>3</sup> This rapid growth has not come without controversy. Critics have charged that ostensibly *shari'ah*-compliant products often mimic conventional financial products too closely, compromising the ethical principles served by *riba* and *gharar* restrictions. These disputes over *shari'ah* compliance have at times deterred Muslim consumers from purchasing disputed products and limited how broadly the products can be effectively marketed across the Islamic world.

This Recent Development examines the plan that one prominent organization, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI), has recently put into motion to address these problems, wherein it assumes an unprecedented regulatory role in reviewing the *shari'ah* compliance of products industry-wide. To place this plan into perspective, Part II provides background on interpretive debates within Islamic finance, while Part III describes the industry's current decentralized system for ensuring *shari'ah* compliance. Part IV details the AAOIFI's plan and considers how it reflects other actions that the AAOIFI has taken to address recent *shari'ah* compliance controversies. Part V concludes that, while the AAOIFI's new authority should help promote convergence in *shari'ah* compliance standards, it may also slow innovation and ultimately fragment Islamic financial markets if applied too aggressively. To avoid this outcome,

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1. For a more complete description of these restrictions, see FRANK E. VOGEL & SAMUEL L. HAYES, III, *ISLAMIC LAW AND FINANCE: RELIGION, RISK, AND RETURN* 71-93 (1998). Other Islamic principles encourage trade by mutual consent, promote commercial probity, emphasize the freedom of contract, and prohibit participation in immoral activities such as the production of alcohol or pornography. See *id.* at 53-69.

2. The term *shari'ah* technically refers to God's infallible divine law, while the rules that imperfect individuals develop in attempting to divine and interpret *shari'ah* are referred to as *fiqh*. While most Islamic finance rules should properly be defined as *fiqh*, see *id.* at 23-24, this piece refers to them collectively as *shari'ah*.

3. *Islamic Banking Assets Continue Double-Digit Growth: Survey*, PENINSULA (Doha), Nov. 6, 2009, <http://www.thepeninsulaqatar.com> (search for "Islamic banking assets growth").

the AAOIFI should retain its historical commitment to gradual change and consensus-building as it approaches its new responsibilities.

## II. DEBATING *SHARI'AH* COMPLIANCE

Understanding the significance of the AAOIFI's recent actions requires some basic background on the interpretive debates surrounding *shari'ah* compliance. At its core, modern Islamic finance is built upon several "nominate contracts," including cost-plus sales (*murabaha*), leases (*ijara*), advance purchases (*salam*), silent partnerships (*mudaraba*), and full partnerships (*musharaka*).<sup>4</sup> Each of these types of contract is accepted as legitimate under Sunni Islamic doctrine, either because it appears in the religion's holy texts or because it has been clearly approved of by prior generations of Islamic scholars.<sup>5</sup> Contemporary scholars often justify these contracts on the more pragmatic grounds that they link investors' returns to tangible assets, encourage risk-sharing, and otherwise discourage *riba* and *gharar* in a manner consistent with *shari'ah*.<sup>6</sup>

Modern financiers have found ways of using these nominate contracts that simulate many of the characteristics of conventional financial products, allowing them to capture Muslim consumers in what some cynically call "*shari'ah* arbitrage."<sup>7</sup> For example, through a *murabaha* contract, a consumer may ask a bank to make a purchase on his behalf on the condition that he later repay the cost plus an additional fee. If this fee is benchmarked to prevailing interest rates, then the transaction has the same economic effect as a conventional interest-bearing loan. While the bank retains ownership and its associated risks until repayment, use of the item purchased can be provided through an accompanying *ijara* lease or other arrangement.<sup>8</sup> Complex products, such as so-called "Islamic bonds," or *sukuk*, often use several layers of nominate contracts, alongside special purpose corporate entities and other measures. In the case of *sukuk*, these help simulate the fixed payments and reliable returns on principal provided by conventional debt instruments.<sup>9</sup>

Defenders of *shari'ah* arbitrage typically rely on a classical formalist approach to Sunni Islamic jurisprudence, which gives great precedential weight to previously approved legal structures and practices.<sup>10</sup> Because each

4. See VOGEL & HAYES, *supra* note 1, at 138-50, 181-200. While Shi'a Islam has its own interpretive approach to Islamic finance issues, this analysis limits itself to the more prevalent branch of Sunni Islam. For a brief comparison of Sunni and Shi'a approaches, see MAHMOUD A. EL-GAMAL, *ISLAMIC FINANCE: LAW, ECONOMICS AND PRACTICE* 19-20 (2006).

5. See EL-GAMAL, *supra* note 4, at 17-19.

6. See, e.g., MUHAMMAD TAQI USMANI, *AN INTRODUCTION TO ISLAMIC FINANCE*, at xiv-xvii (2002).

7. EL-GAMAL, *supra* note 4, at 75.

8. See VOGEL & HAYES, *supra* note 1, at 140-45. For additional examples along these lines, see EL-GAMAL, *supra* note 4, at 3-7.

9. See Michael J.T. McMillen, *Asset Securitization Sukuk and Islamic Capital Markets: Structural Issues in These Formative Years*, 25 WIS. INT'L L.J. 703, 749-58 (2008) (describing the structures of several complex *sukuk* arrangements).

10. See VOGEL & HAYES, *supra* note 1, at 42-44 (describing the "casuistic style" of classical Sunni legal reasoning). But see Haider Ala Hamoudi, *The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*, 56 AM. J. COMP. L. 423 (2008) (arguing that the formalist emphasis on classical doctrine serves a largely rhetorical function).

nominate contract has been accepted as *shari'ah*-compliant in the past, these individuals argue that even complex arrangements of them must be compliant as well, so long as they conform with the previously approved forms.<sup>11</sup> Many critics, however, maintain that *shari'ah* compliance should be judged by a product's functional impact on society as compared to *shari'ah* principles of social justice and risk sharing.<sup>12</sup>

Sunni Islam has little formal hierarchy for resolving such doctrinal disputes.<sup>13</sup> Consequently, this formalist-functionalist tension and other interpretive debates play out between Islamic scholars whenever they debate the *shari'ah* compliance of particular products, often leading to divergent interpretations.<sup>14</sup> For some, this lack of clear standards raises fears that scholars may at times neglect their obligation to interpret in good faith, and simply use whatever bundle of authorities allows them to justify their preferred outcome.<sup>15</sup> Such concerns are particularly relevant to lay Muslim consumers, who are generally seen as lacking the authority and expertise necessary to determine independently the legitimacy of scholars' rulings.<sup>16</sup>

### III. MANAGING SHARI'AH COMPLIANCE RISK

Where Islamic scholars disagree on the *shari'ah* compliance of a given product, consumers often limit themselves to products approved by their local scholars or simply avoid disputed products altogether. As disagreements over *shari'ah* compliance hinder products' sales and overall economic performance, both reactions expose banks, state treasuries, and other financial institutions that deal in Islamic financial products to what one scholar calls "*shari'ah* compliance risk."<sup>17</sup> To reduce this risk, these Islamic financial institutions have worked to find ways to minimize public disagreement and collaborate toward commonly accepted standards.

Most of the responsibility for ensuring *shari'ah* compliance lies with panels of Islamic scholars and finance experts called *shari'ah* supervisory boards. Located within Islamic financial institutions, these boards work with an institution's staff to develop, review, and supervise financial products to ensure that they abide by *shari'ah* requirements. Ultimately, it is these boards' approval that signals to Muslim consumers that a given product is *shari'ah*-compliant. To convince as broad a swathe of Muslim consumers as possible to

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11. See Ayman A. Abdel-Khaleq & Christopher F. Richardson, *New Horizons for Islamic Securities: Emerging Trends in Sukuk Offerings*, 7 CHI. J. INT'L L. 409, 411-13 (2007); Shaykh Yusuf Talal DeLorenzo, *Shari'ah Compliance Risk*, 7 CHI. J. INT'L L. 397, 405-07 (2007).

12. See Haider Ala Hamoudi, *Jurisprudential Schizophrenia: On Form and Function in Islamic Finance*, 7 CHI. J. INT'L L. 605, 619-21 (2007).

13. Several prominent pan-Islamic organizations, such as the Organization of the Islamic Conference, address contentious subjects in Islamic law through treatises and collective rulings. While their opinions are widely respected, they are also rare and not necessarily authoritative. See MOHAMMAD HASHIM KAMALI, *SHARI'AH LAW: AN INTRODUCTION* 255-57 (2008).

14. See VOGEL & HAYES, *supra* note 1, at 34-41.

15. See *id.* at 36-38 (describing concerns over patching, or *talfiq*).

16. See KAMALI, *supra* note 13, at 162-66. But see Robert R. Bianchi, *The Revolution in Islamic Finance*, 7 CHI. J. INT'L L. 569, 577-80 (2007) (describing how the "democratization of religious thought" happens as lay Muslim consumers' purchasing power gives their perspectives greater significance).

17. See DeLorenzo, *supra* note 11, at 397.

accept the board's position, most try to include scholars with widely recognized religious qualifications from a diverse array of jurisprudential perspectives.<sup>18</sup> That said, the rapid growth of the Islamic finance industry has created a shortage of qualified Islamic scholars in recent years, stretching scholars' availability and forcing some institutions to rely increasingly upon lay experts.<sup>19</sup>

While *shari'ah* supervisory boards have become prevalent, the fact that they are paid and maintained by the same institutions that they supervise raises concerns regarding their independence and reliability. Consequently, some groups have also worked to establish standards that can be applied as a neutral benchmark across institutions. The Bahrain-based AAOIFI is the oldest and most prominent of these organizations, as it has spent nearly two decades developing the industry's most widely accepted standards on *shari'ah* compliance and other topics. Another prominent organization is the Islamic Finance Services Board (IFSB) in Malaysia, which generates similar standards with a special emphasis on the complex banking, capital markets, and insurance sectors. Both groups incorporate Islamic scholars, industry members, and regulators into the standards-generating process through various conferences and working groups.<sup>20</sup> While some nations have mandated the implementation of these or similar standards, they remain largely voluntary.<sup>21</sup> That said, market pressures have promoted their widespread implementation.<sup>22</sup>

But in spite of these efforts, this system sometimes still yields different perspectives on particular products, particularly along regional lines.<sup>23</sup> Most notably, scholars in the Persian Gulf have repeatedly criticized their Southeast Asian counterparts for approving certain controversial but market-friendly products. Despite this disapproval, Muslim consumers in Southeast Asia have generally followed the opinions of their local experts and continued to treat these instruments as legitimate.<sup>24</sup> While not widely disruptive, this disagreement underscores the uncertainty surrounding *shari'ah* compliance and helps explain why some argue that even stronger standards are needed.

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18. See *id.* at 399-402.

19. See Alexia Garamfalvi, *Islamic Scholars Play Role in High Finance*, LEGAL TIMES (Wash., D.C.), Apr. 30, 2007, at 13.

20. See *Who Regulates the Islamic Finance Sector?*, REUTERS, Apr. 13, 2009, <http://www.reuters.com/article/idINKLR44252720090413>. For additional information on the history of the AAOIFI and IFSB, their recent activities, and examples of their standards, visit their websites. Accounting and Auditing Organization for Islamic Financial Institutions, <http://www.aaofi.com> (last visited Nov. 28, 2009); Islamic Financial Services Board, <http://www.ifsb.org> (last visited Nov. 28, 2009).

21. See Tarek S. Zaher & M. Kabir Hassan, *A Comparative Literature Survey of Islamic Finance and Banking*, FIN. MARKETS, INSTITUTIONS & INSTRUMENTS, Nov. 2001, at 155, 185-187 (surveying regulatory approaches to Islamic finance).

22. See DeLorenzo, *supra* note 11, at 401.

23. See Bianchi, *supra* note 16, at 575-76.

24. See EL-GAMAL, *supra* note 4, at 86-89 (describing the two regions' different approaches to *salam*, or futures). But see Liao Y-Sing & Tom Freke, *As Scholars Quibble, Sharia Banks Eye Convergence*, REUTERS, Apr. 17, 2009, <http://www.reuters.com/article/idUSTRE53G14X20090417> ("Malaysia shows signs of tempering its market-driven approach to please cash-rich but conservative Middle East investors.").

## IV. THE AAOIFI'S PROPOSED NEW REGULATORY ROLE

The AAOIFI's aspiration to "homogenise the market" through its new regulatory authority reflects these calls for more unified *shari'ah* compliance standards.<sup>25</sup> As Secretary-General Mohamed Alchaar described in August 2009, the AAOIFI intends to review "products and services offered by the industry for [*shari'ah*] compliance" to help fill the "huge gap in the market relating to credible compliance screening."<sup>26</sup> Alchaar describes this new role, which is pending approval by the AAOIFI's Board of Trustees, as a temporary one that will cease when permanent screening mechanisms are developed. That said, the AAOIFI has said that it will conduct its screening "market-wide, regardless of the geographic distribution of products,"<sup>27</sup> implying that it will review even those products whose issuers have chosen not to implement the AAOIFI's ostensibly voluntary standards. And while Alchaar emphasized that the AAOIFI would first work with institutions to address *shari'ah* compliance concerns, he made clear that it would go public with its concerns if necessary.<sup>28</sup> Though Alchaar does not say so explicitly, this threat of public censure and its market consequences appears to be the stick with which the AAOIFI will enforce its determinations.

This interpretation is informed by the AAOIFI's actions during a recent controversy surrounding the *shari'ah* compliance of certain types of *sukuk*. In an influential 2007 paper, the Chairman of the AAOIFI's *Shari'ah* Board, Sheikh Muhammad Taqi Usmani, argued that *sukuk* that guaranteed purchasers interest-free loans and repurchase agreements in cases of missed payments or default were not *shari'ah*-compliant, as they effectively tied an investor's returns to the creditworthiness of the issuer instead of the value of the underlying assets in violation of *gharar* restrictions.<sup>29</sup> Later that year, Usmani made public statements that as much as eighty-five percent of the world's *sukuk* could be *shari'ah*-noncompliant due to these and other measures, triggering an intense controversy.<sup>30</sup> After several months of debate, the AAOIFI confirmed much of Usmani's analysis and issued new *sukuk* guidelines prohibiting these practices.<sup>31</sup> Tellingly, these guidelines also admonished the *shari'ah* supervisory boards that had permitted such activities, reasserting their duty to "make sure that the operation complies, at every

25. *AAOIFI To Monitor Shariah Products*, REUTERS, Oct. 10, 2009, [http://www.business24-7.ae/Articles/2009/8/Pages/09082009/08102009\\_af046d1da5cd49bb9d0cab506b826ef4.aspx](http://www.business24-7.ae/Articles/2009/8/Pages/09082009/08102009_af046d1da5cd49bb9d0cab506b826ef4.aspx) (quoting a statement by Mohamed Nedal Alchaar, Secretary-General of the AAOIFI).

26. *Id.*

27. *Id.*

28. *See Islamic Finance Growth Seen 10-20 Pct in 3yrs—Study*, REUTERS, Oct. 15, 2009, <http://www.reuters.com/article/idUSLF70613620091015>.

29. *See* Muhammad Taqi Usmani, *Sukuk and Their Contemporary Applications* 7-13 (2007) (unpublished manuscript), available at [http://www.failaka.com/downloads/Usmani\\_Sukuk\\_Applications.pdf](http://www.failaka.com/downloads/Usmani_Sukuk_Applications.pdf); *see also* Farmida Bi, AAOIFI Statement on Sukuk and Its Implications (Sept. 2008), <http://www.nortonrose.com/knowledge/publications/2008/pub16852.aspx>.

30. *See Islamic Bond Rules May Be Reviewed*, GULF DAILY NEWS (Bahr.), Nov. 22, 2007, <http://www.gulf-daily-news.com/NewsDetails.aspx?storyid=200624>.

31. *See* Accounting & Auditing Org. for Islamic Fin. Inst. (AAOIFI), Clarification of the AAOIFI Standards Concerning Sukuk (Feb. 2008), [http://www.aaofi.com/aaofi\\_sb\\_sukuk\\_Feb2008\\_Eng.pdf](http://www.aaofi.com/aaofi_sb_sukuk_Feb2008_Eng.pdf).

stage, with [*shari'ah*] guidelines and requirements.”<sup>32</sup> As Alchaar later described, these actions effectively “wrecked the market”<sup>33</sup> for *sukuk*, leading to a decrease in overall issuances and a dramatic shift toward less controversial *ijara*-based *sukuk* structures. As institutions feared that consumers would react negatively to the AAOIFI’s public censure, they rallied market forces that effectively curbed the offending practices and triggered a more widespread reevaluation of *sukuk* standards by issuers.<sup>34</sup>

Meanwhile, as the Islamic finance industry struggled through the ensuing global financial crisis, many more voices joined the call for more effective *shari'ah* compliance, arguing that close imitation of conventional finance had exposed the industry to unnecessary and unethical risks.<sup>35</sup> For individuals interested in advancing such a system, the AAOIFI—respected for its widely accepted standards and now demonstrably able to enforce its stance through market forces—no doubt seemed increasingly well-suited to do so. Hence, this growing consensus around the need for better regulation and recognition of means by which it could be achieved together seem to be likely motivators for the AAOIFI’s most recent actions.

#### V. IMPLICATIONS FOR THE ISLAMIC FINANCE INDUSTRY

Thus far, responses to the AAOIFI’s proposal have been reservedly optimistic. Some industry leaders have welcomed its proposal as a “very good move” toward more uniform *shari'ah* compliance standards.<sup>36</sup> Most agree that shared international standards will reduce the *shari'ah* compliance risk facing many products and create larger and more efficient consumer markets by allowing institutions more easily to market their products in different countries and regions. That said, others have expressed some reservations. While the AAOIFI’s existing standards are widely accepted, this is in part because they leave significant space for interpretation and innovation in application. Reviewing actual applications of these standards will require the AAOIFI to take a stronger stand on certain interpretive disputes, foreclosing opportunities for innovation and triggering new resistance.<sup>37</sup>

Yet there are signs that some influential figures within the AAOIFI feel that such a strong stand is necessary. Most notable among them is Sheikh Usmani. In his 2007 paper on *sukuk*, Usmani noted that Islamic scholars’

32. *Id.* at 4.

33. Jason Benham, *Islamic Bond Market 'Wrecked' by Critical Remarks*, ARABIANBUSINESS.COM, Oct. 29, 2008, <http://www.arabianbusiness.com/536401-islamic-bond-market-wrecked-by-critical-remarks> (quoting a statement by Mohamed Nedal Alchaar, Secretary-General of the AAOIFI).

34. See Daliah Merzaban, *Scholar Critique Spurs Ijara Islamic Bond*, REUTERS, Apr. 15, 2009, <http://www.reuters.com/article/idUSTRE53C0ZX20090415>.

35. See, e.g., Lahem al Nasser, *Imitating Traditional Banking Will Destroy Islamic Banking*, ASHARQ ALAWSAT (London), Nov. 28, 2009, <http://aawsat.com/english/news.asp?section=6&id=18957>.

36. *Lack of Sharia Standard Limiting Islamic Funds—BNP*, FORBES.COM, Sept. 13, 2009, <http://www.forbes.com/feeds/afx/2009/09/13/afx6879191.html> (quoting a statement by Jacques Tripon, Global Head of Islamic Banking, BNP Paribas).

37. For a survey of industry perspectives on convergence, see Karen Remo-Listana, *Islamic Finance Standardisation Needs To Be Tackled Carefully*, EMIRATES BUSINESS 24/7, Oct. 25, 2009, <http://www.business24-7.ae> (search for “Islamic finance standardisation”).

leniency on many matters of *shari'ah* compliance had been intended to permit the industry to innovate and grow in its difficult early years, when it had to compete directly with conventional finance. But now that the industry has come into its own, Usmani argues, Islamic institutions should “cooperate among themselves for the purpose of developing authentic products that . . . serve the higher purposes of Islamic law” more than economic interests.<sup>38</sup> Usmani saw his position on *sukuk* as a reflection of this need to push the industry toward higher standards, a need that has been echoed in postfinancial crisis rhetoric.<sup>39</sup>

The AAOIFI's new regulatory authority could be a potent tool for those wishing to push Islamic finance out of its infancy and toward more rigorous standards. But employing it too aggressively will deter innovation and thus make Islamic financial products increasingly inefficient compared to conventional products. As this efficiency gap increases, marginal Muslim consumers willing to purchase conventional ones if they offer significantly better terms may effectively get priced out of the Islamic market. Not only would this weaken the impact of the AAOIFI's censure, but some institutions might also find it more profitable to buck the AAOIFI and adopt less demanding standards that capture these marginal consumers. Ironically, this could result in the very outcome that the AAOIFI is intended to counteract: fragmentation along interpretive and regional lines.<sup>40</sup>

## VI. CONCLUSION

By strategically applying its new regulatory authority, the AAOIFI can encourage continued convergence, gradually advance more demanding *shari'ah* compliance standards, and eliminate particularly problematic industry practices. But using the threat of public censure to impose new standards too aggressively could injure innovation and efficiency, and create new fault lines within Islamic financial markets. Consequently, the new regulators at the AAOIFI must be careful in approaching their new responsibilities, and do so with the respect for gradualness and consensus-building to which the industry owes much of its success thus far.

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38. Usmani, *supra* note 29, at 14. The AAOIFI's official *sukuk* standards similarly encourage Islamic financial institutions “to increase true partnerships based on profit and loss sharing in order to achieve the objectives of the Shari'ah.” AAOIFI, *supra* note 30, at 4.

39. See, e.g., al Nasser, *supra* note 35.

40. See Bianchi, *supra* note 16, at 575-76.





## A Supreme Court, Supreme Parliament, and Transnational National Rights. By Alyssa King

In October 2009, the former Law Lords became justices of the newly created Supreme Court of the United Kingdom. With new jurisdiction, and with its own building and resources, the Supreme Court is separate from Parliament for the first time.<sup>1</sup> The new Court can be seen as a procedural complement to the substantive reform made by the United Kingdom's Human Rights Act (HRA).<sup>2</sup> Parliament's decision to create the Court, like its choice to codify human rights law, was made partly in response to the influence of the European Court on Human Rights (ECtHR) and supranational institutions on the state. Some politicians hoped that a supreme court would be able to articulate a distinct national vision in response to the imposition of supranational instruments.

If this reaction were confined to the United Kingdom, it might be a particularity of that state's relationship with continental Europe, but similar courses of action have come to pass in other states with traditions of parliamentary sovereignty. In 2003, reforms in Belgium gave the Constitutional Court the power to review rights under the national constitution.<sup>3</sup> The French Parliament is finalizing a grant of concrete jurisdiction over rights cases to the Constitutional Council which previously was limited to abstract questions of constitutionality raised by Parliament.<sup>4</sup> In each of these instances, parliamentary discussions have highlighted the perceived need to create a system of constitutional review that will have priority over review under the European Convention on Human Rights (ECHR).<sup>5</sup>

In many European states, judges in supreme courts have been viewed as potential buffers between the national legislature and the ECtHR, creating a coherent explanation of the legal order and giving transnational rights local meaning.<sup>6</sup> Speaking of fundamental rights and values, these judges explain the meaning of the law by choosing among competing narratives, or by writing their own.<sup>7</sup> In some respects, the recent reforms to the European judiciaries have only reinforced the judicial role as it has traditionally operated under systems of parliamentary sovereignty; they further empower judges to allow them to speak for the constitution on the belief that judges are the "mouth . . .

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1. Constitutional Reform Act, 2005, c. 4, §§ 40, 48-50 (Eng.).

2. Human Rights Act, 1998, c. 42 (Eng.).

3. Erika de Wet, *The Reception Process in the Netherlands and Belgium*, in A EUROPE OF RIGHTS 229, 250 (Helen Keller & Alec Stone Sweet eds., 2008).

4. Bill No. 1975 of Oct. 14, 2009, <http://www.assemblee-nationale.fr/13/pdf/projets/pl1975.pdf> (Fr.).

5. See, e.g., Verbatim Report from the Session of July 21, 2008, *Journal Officiel de la République Française: Débats Parlementaires* [J.O.] [Official Gazette of France: Parliamentary Debates], July 22, 2008, at 15-16 (Fr.), available at <http://www.assembleenationale.net/13/pdf/cr/2007-2008-extra/20081990.pdf>.

6. See, e.g., Aidan O'Neill, *Judging Democracy: the Devolutionary Settlement and the Scottish Constitution*, in BUILDING THE UK'S NEW SUPREME COURT 23, 36-37 (Anthony Le Sueur ed., 2004) (arguing that the German constitutional courts play a protective role as a final arbiter on fundamental rights and that British courts may too).

7. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 9-10 (1983).

of the law.”<sup>8</sup> Entry into the supranational European legal order brought a second layer of judicial review, but not necessarily a new view of judges. Judges in national high courts are assumed to express the national law in their decisions, as opposed to ECtHR judges who employ transnational legal norms in their work.

The idea that the judge gives voice to a component of national identity is readily apparent in discussions of the HRA. The United Kingdom began allowing individual petitions to the ECtHR in 1966, as attempts to create a bill of rights gained traction.<sup>9</sup> The incorporation of the ECHR into national law provided an expedient way to write a human rights bill, as was done in 1998 with the HRA.<sup>10</sup> Supporters walked a thin line between engaging Europe and maintaining that the rights they sought to codify were not foreign. In this vein, the United Kingdom’s involvement in drafting the ECHR was frequently cited in political debate.<sup>11</sup> The title of the government’s white paper on the HRA bill, *Rights Brought Home*, evokes the idea that the rights in the ECHR are properly British rights, and that they ought to be dealt with “at home.” The number of U.K. cases sent to the ECtHR remained a political preoccupation.<sup>12</sup> Some politicians saw the work of the ECtHR as revoking control over the development and direction of U.K. law from the United Kingdom.

Though they wished to decrease the number of cases in the ECtHR and keep cases in the U.K. courts, parliamentarians understood that incorporating the ECHR would not remove the possibility that some cases would reach the supranational court. Still, supporters of the bill emphasized the importance of the domestic judicial voice. As the government put it: “British judges will be enabled to make a distinctively British contribution to the development of the jurisprudence of human rights in Europe.”<sup>13</sup> The influence of British judges was a remedy not only for the volume of cases the United Kingdom had to defend in the ECtHR, but also for perceived misunderstandings of and lack of appreciation for the state’s legal tradition.<sup>14</sup> Concerns about preservation of U.K. law were transformed into concerns about giving U.K. judges tools with which to express the law of the sovereign vis-à-vis European judges.

The creation of the Supreme Court in the 2005 Constitutional Reform Act (CRA) continued this theme with implications for the distribution of judicial power in two respects. First, the CRA unifies final jurisdiction over rights cases. Second, the removal of the Law Lords from Parliament

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8. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 163 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. & trans., Cambridge Univ. Press 2006) (1748) (describing the U.K. constitution and referring to judges as the “mouth that pronounces the words of the law”).

9. ROBERT BLACKBURN, *TOWARDS A CONSTITUTIONAL BILL OF RIGHTS FOR THE UNITED KINGDOM* 5-6 (1999).

10. *Id.* at 7.

11. See, e.g., 582 PARL. DEB., H.L. (5th ser.) (1997) 1227f, reprinted in BLACKBURN, *supra* note 9, at 377; HOME DEP’T, *RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL*, 1997, Cm. 3782, ¶ 1.14, available at <http://www.archive.official-documents.co.uk/document/hoffice/rights/contents.htm>.

12. Compare Human Rights Sub-Comm., Nat’l Executive Comm., *A Charter of Human Rights: A Discussion Document for the Labour Movement* (1976), reprinted in BLACKBURN, *supra* note 9, at 917, 921, with HOME DEP’T, *supra* note 11, ¶ 1.16.

13. HOME DEP’T, *supra* note 12, ¶ 1.14.

14. See, e.g., MARY BARBER, HOME AFFAIRS SECTION, *THE HUMAN RIGHTS BILL*, 1997-8, H.C. 98/24, at 14; see also 582 PARL. DEB., H.L. at 1227f.

underlines the independence of the judiciary.<sup>15</sup> The strategy is to accept European norms in order to more effectively resist them, but the logic behind this strategy relies on a misperception about the ability to draw distinctions between judges and the law. Judges may be important, but only because they are assumed to defend and explain state law, not change it.

The HRA serves as a basis for invalidating judicial and administrative decisions.<sup>16</sup> For statutes, the Court exercises what Mark Tushnet calls “weak-form judicial review.”<sup>17</sup> Justices are to interpret laws in a way that renders them compatible with the HRA where possible. If the Court deems it appropriate, it may issue a declaration of incompatibility. This declaration sets in motion a process to change the law, through ordinary legislation, fast track legislation or, in urgent cases, a ministerial order that then must be ratified by Parliament.<sup>18</sup>

Unified jurisdiction was needed after Scottish devolution created opportunities for disagreement between the Lords’ and Privy Councils.<sup>19</sup> Under devolution, Parliament has granted limited legislative powers to regional legislatures. Until the creation of the new Supreme Court, the Privy Council reviewed the limits on the powers of these devolved parliaments.<sup>20</sup> The Scottish Parliament may not make laws contrary to the ECHR. Litigation in the Privy Council became a particularly important avenue for ECHR claims regarding Scottish criminal law, which the Law Lords had no power to review.<sup>21</sup> Meanwhile, the Law Lords (who also made up part of the judicial committee of the Privy Council) used the HRA to review acts of Parliament and other laws made by the devolved legislatures. Because devolution decisions are binding on all British judges, the small space in which the Privy Council has dominated, Scottish criminal law, had an outsized effect on the rest of the United Kingdom.<sup>22</sup> This arrangement thus would have given Scottish law disproportionate influence in the legal system. Limiting the effect of Scottish criminal cases to Scotland or refusing to recognize parallel jurisprudence between the ECHR and the HRA were not satisfactory solutions because either option would leave a disjointedness akin to a circuit split in the U.S. federal courts that the ECtHR would have to resolve. Such an arrangement would further conflict with a unified vision of the rule of law in the United Kingdom.

Another justification for creating a Supreme Court in the United Kingdom was the enhanced visibility of separation of powers.<sup>23</sup> This cosmetic change has both internal and external audiences. The government had hoped

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15. DEP’T FOR CONSTITUTIONAL AFFAIRS, CONSTITUTIONAL REFORM: A SUPREME COURT FOR THE UNITED KINGDOM 157 (2003), <http://www.dca.gov.uk/consult/supremecourt/supreme.pdf>.

16. COLIN TURPIN & BETH TOMPKINS, BRITISH GOVERNMENT AND THE CONSTITUTION 272 (6th ed. 2007).

17. MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 28 (2008).

18. *Id.*

19. O’Neill, *supra* note 6, at 42.

20. Anthony Bradley, *The Sovereignty of Parliament-Form or Substance?*, in THE CHANGING CONSTITUTION 25, 50 (Jeffrey Jowell & Dawn Oliver eds., 6th ed. 2007).

21. O’Neill, *supra* note 6, at 31.

22. *Id.* at 33.

23. 429 PARL. DEB., H.C. (6th ser.) (2005) 564 (statement of Christopher Leslie) (claiming the Court will “create a visible apex of an independent United Kingdom judicial system”).

that the internal audience, U.K. residents, would become more aware of the role of law in their lives,<sup>24</sup> further emphasizing its aim of building a sense of national identity through legal identity.<sup>25</sup> Externally, the change was thought to alleviate tension between the domestic judiciary and the ECtHR, which has been seen as increasingly assertive in its criticism of domestic judiciaries.

One general goal of the CRA was to increase judicial independence.<sup>26</sup> Independence is of greater importance when judges have greater powers to censure the legislature and when it is important that people recognize that they can enforce their rights in national courts. Like the HRA, the Court was presented as a “modernizing” move, bringing the United Kingdom in line with the rest of Europe.<sup>27</sup> Lord Thomas Bingham, an early campaigner for the Supreme Court, declared the need to respond to global changes and clarify the functional separation of powers “a cardinal aspect of a modern liberal democratic state governed by the rule of law.”<sup>28</sup>

As the U.K. government was aware, European decisions also raised the possibility that the Law Lords’ place in the legislature would be incompatible with ECHR guarantees of an impartial judiciary.<sup>29</sup> The 2000 ECtHR decision of *McGonnell v. United Kingdom* censured a local official who presided over deliberations on a development plan and then sat as judge in a case challenging the plan several years later.<sup>30</sup> It prompted the Law Lords to adopt a statement saying they would no longer take part in politically sensitive debates.<sup>31</sup> The analogy is imperfect, as the House of Lords can delay but cannot create law. Yet, given their increased ability to rule on rights and their place as expositors of U.K. law, the Lords may have wished to avoid any risk that the ECtHR would threaten their position and legitimacy. By making a concession on structure, U.K. politicians avoid concessions on the content of U.K. laws.

The new U.K. Supreme Court reflects a reaction to the growing importance of European law in the legal systems of member states. This reaction, which ties national law to national identity, also assumes domestic judges will be defenders of that law. This attitude, apparent in the HRA, is also evident in the creation of the Court, which unifies jurisdiction on rights issues and raises the profile of the domestic judges. Still, these reforms depend not only on the identification of law with identity, but also on that of the judge with the law. In one sense, the HRA may have brought rights home; the number of British petitions to the ECtHR has been reduced in recent years.<sup>32</sup> However, the government’s incentives to heed declarations of incompatibility

24. DEP’T FOR CONSTITUTIONAL AFFAIRS, *supra* note 15, at 11.

25. See, e.g., MINISTRY OF JUSTICE, RIGHTS AND RESPONSIBILITIES: DEVELOPING OUR CONSTITUTIONAL FRAMEWORK, 2009, Cm. 7577.

26. DEP’T FOR CONSTITUTIONAL AFFAIRS, *supra* note 15, at 11, 13.

27. Michael Skold, *The Reform Act’s Supreme Court: A Missed Opportunity for Judicial Review in the United Kingdom?*, 39 CONN. L. REV. 2149, 2157 (2007).

28. Anthony Lester, *The Human Rights Act 1998—Five Years On*, 2004 EUR. HUM. RTS. L. REV. 258.

29. 657 PARL. DEB., H.L. (5th ser.) (2004) 1226.

30. App. No. 28488/95, 30 Eur. H.R. Rep. 289, 291 (2000).

31. TURPIN & TOMPKINS, *supra* note 16, at 125.

32. Robert Verkaik, *Lawsuits on Human Rights Halve Despite European Act*, INDEPENDENT (U.K.), Apr. 20, 2009, at 16.

are directly linked to the threat of loss in the ECtHR if it does not amend its laws.<sup>33</sup> As a result, the goal of a reduction in petitions will clash with the Supreme Court's institutional interests because it deprives the Court of a meaningful enforcement mechanism against Parliament. As the Court responds to changes to the status of national law wrought by European integration, not to mention internal rights debates such as those over privacy and terrorism, Parliament may question the representativeness of these judges. Its authority will likely be built on a more complicated picture of how judges interact with litigants and law and to what extent judges can be said to speak for law.

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33. TUSHNET, *supra* note 17, at 30.



**North Korea and the Politics of International Trade Law: the Kaesong Industrial Complex and WTO Rules of Origin. By Daniel J. Knudsen & William J. Moon<sup>†</sup>**

The Kaesong Industrial Complex (KIC), a new joint economic venture between the Democratic People's Republic of Korea (North Korea) and the Republic of Korea (South Korea), is becoming a nexus of controversial issues in international trade law. The manufacturing centers at Kaesong, located in North Korea, use North Korean labor and South Korean capital to produce labor-intensive products like clothes, shoes and watches.<sup>1</sup> These goods are then shipped to South Korea and either consumed there or exported.<sup>2</sup>

The export of KIC goods could be problematic under the World Trade Organization's (WTO) Rules of Origin and rules on preferential treatment. North Korea is not a member of the WTO, and its human rights record and isolationism make it a highly polarizing state.<sup>3</sup> States that have allowed KIC goods to be treated as goods produced in South Korea are pursuing a policy that may violate WTO regulations. Through South Korea's membership in the WTO and South Korean Free Trade Agreements (FTAs), the goods produced in the KIC bypass many of the trade sanctions placed upon North Korean goods.

With the resumption of daily cross-border traffic into the KIC this summer, the resurgence of economic cooperation between North and South Korea brings these trade issues into international focus once again.<sup>4</sup> There are also important issues for the U.S. government to consider, in light of the U.S.-Korea Free Trade Agreement, signed but not yet in force. While the issue of the KIC has received some attention in the literature, scholars have yet to scrutinize WTO law and the other legal issues that surround the topic. This piece presents an overview of the KIC and the legal issues it raises, provides preliminary analysis of these issues, and raises awareness of the important policy implications that the U.S. government should consider.

The development of the KIC dates to 1989, when Hyundai Asan, one of the largest conglomerates in South Korea, first engaged with North Korean leadership to develop a special economic zone in North Korea. In 2000, Hyundai Asan offered US\$500 million to Pyongyang in return for exclusive

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<sup>†</sup> The authors would like to thank Professor Lea Brilmayer of Yale Law School, Research Professor Lim Eul-chul of Kyungnam University in South Korea, and the editorial staff of the *Yale Journal of International Law*.

1. Moon Ihlwan, *North Korea's Kaesong Clamor*, BUS. WK., June 11, 2009, available at [http://www.businessweek.com/globalbiz/content/jun2009/gb20090611\\_786969.htm](http://www.businessweek.com/globalbiz/content/jun2009/gb20090611_786969.htm).

2. Ho Cheol Kim, *Does Annex 22-B of the Proposed United States-Korea Free Trade Agreement Contemplate and Allow for Trade with Respect to North Korea?*, 40 GEO. J. INT'L L. 67, 71-73 (2008).

3. See generally James T. Laney & Jason T. Shaplen, *How To Deal with North Korea*, FOREIGN AFF., Mar.-Apr. 2003, at 16 (2003) (discussing rising tensions in the Korean peninsula); Stephan Haggard & Marcus Noland, *North Korea in 2008: Twilight of the God?*, 49 ASIAN SURVEY 98 (2009), available at <http://caliber.ucpress.net/doi/pdf/10.1525/as.2009.49.1.98> (discussing recent developments in North Korean international relations).

4. Choe Sang-Hun, *North Korea Opens Border; Again Calls for U.S. Treaty*, N.Y. TIMES, Sept. 2, 2009, at A8; Evan Ramstad & Sungha Park, *Pyongyang Raises Ire on Industrial Complex*, WALL ST. J., June 12, 2009 (describing how production at the KIC has frequently been interrupted by changing political circumstances in the region).

business rights over the development of sixty-six million square meters in Kaesong.<sup>5</sup> Despite political setbacks between the two countries,<sup>6</sup> North Korea eventually passed the Kaesong Industrial Zone Law on November 20, 2002. On December 23, 2002, North Korea granted Hyundai a Land Use Permit and on June 30, 2003 groundbreaking ceremonies took place.<sup>7</sup> Production of goods started in 2004, and has progressed unevenly since then.<sup>8</sup>

From a business perspective, the KIC has several attractive features. First, North Korean authorities established the minimum wage at US\$68.10 per month in 2007,<sup>9</sup> which is “lower than the average wage of workers at Qingdao, China, which is approximately US\$100 [per month], and is only 43% of the wages of Ho Chi Minh City, Vietnam (US\$134 per month).”<sup>10</sup> Secondly, the corporate income tax rate of 10-14% is better than South Korea’s 13-25%, China’s 15%, and Vietnam’s 10-15%.<sup>11</sup> These features have led to a proliferation of trade between North Korea and South Korea since the opening of the KIC: in 2008, the total commercial exchange reached US\$1.82 billion, accounting for 45% of North Korea’s total trade.<sup>12</sup> As of February 2009, 101 South Korean companies employ about thirty-nine thousand North Koreans in the complex.<sup>13</sup> The explosive growth of the KIC is only the beginning, as estimates from the South Korean government suggest that when the complex is fully operational sixteen hundred businesses, employing ninety-nine thousand workers, will account for US\$17.1 billion in annual output.<sup>14</sup>

Despite these ambitious plans and the resumption of manufacturing in the KIC, there has been little transnational legal scrutiny of the treatment of goods manufactured at the KIC with regards to rules of origin. Controversially, the policy of treating the goods as South Korean in origin would de facto grant some goods produced in North Korea the treatment accorded to those from a state with most-favored-nation (MFN) status under the WTO,<sup>15</sup> and these goods would benefit even further from some of South Korea’s FTAs. In this section, we discuss the WTO Rules of Origin and highlight one WTO panel decision that may be instructive in predicting the outcome of legal challenges relating to the production of goods at the KIC.

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5. LIM EUL-CHUL, KAESONG INDUSTRIAL COMPLEX: HISTORY, PENDING ISSUES, AND OUTLOOK 15-17 (2007).

6. Joongi Kim, *The Challenges of Attracting Foreign Investment into North Korea: The Legal Regimes of Sinuiju and Gaeseong*, 27 FORDHAM INT’L L.J. 1306, 1309 (2004) (discussing the impact of the war against terror, a skirmish in the Yellow Sea between North Korean and South Korean naval forces, and Hyundai Asan’s financial troubles).

7. *Id.* at 1309-10.

8. *See, e.g.*, Choe Sang-Hun, *Joint Project Puts 2 Koreas at Odds Again*, N.Y. TIMES, Apr. 21, 2009, at A7.

9. EUL-CHUL, *supra* note 5, at 147.

10. *Id.* at 72.

11. *Id.* at 73. In addition, South Korean companies conducting business in North Korea are not required to pay taxes in South Korea. *See id.*

12. U.S. Dep’t of State, Background Note: South Korea (Oct. 2009), <http://www.state.gov/r/pa/ei/bgn/2800.htm>.

13. *Id.*

14. EUL-CHUL, *supra* note 5, at 60.

15. The most-favored-nation principle of the WTO articulates that importing nations may not treat member states differently when granting trade advantages (for example, tariffs or quotas).



Since there is no doctrine of stare decisis in WTO dispute settlements, our analysis is necessarily rooted in the context of the political economy of international trade.

In response to concerns about rules of origin as barriers to trade, the WTO passed the 1994 Agreement on Rules of Origin,<sup>16</sup> attempting to harmonize disparate sets of rules.<sup>17</sup> The Agreement sets out two types of rules of origin: preferential rules of origin and nonpreferential rules of origin. Preferential rules of origin are rules tied to side agreements between two or more states and are different from nonpreferential rules in that “[nonpreferential rules of origin] are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article I of GATT 1994.”<sup>18</sup> The WTO Rules of Origin do not apply to preferential trading arrangements between two or more countries, such as the “Generalized System of Preferences (GSP), free trade areas, [and] bilateral and regional integration agreements.”<sup>19</sup> Rules not falling under these exceptions are treated as nonpreferential, bound by the WTO Rules of Origin.

Export of KIC goods involves both types of rules of origin. For countries that have bilateral trade agreements with South Korea, the specific FTAs will govern the origin status of KIC goods. South Korea has aggressively negotiated with its trading partners to treat goods from the KIC as South Korean goods, using special rules in their FTAs to determine origin status. This resulted in the Association of South East Asian Nations (ASEAN) acknowledging KIC products as “Made in Korea,” and the European Free Trade Association (EFTA) and Singapore have also granted tariff preferences for KIC-manufactured goods, treating them as South Korean goods.<sup>20</sup> South Korea’s FTA with Singapore uses an Integrated Sourcing Initiatives rule in which “the sole requirement [for origin] . . . is that goods must be directly exported from the territory of South Korea, irrespective of the origin status of the goods.”<sup>21</sup> The FTAs with EFTA and ASEAN use an Outward Processing approach.<sup>22</sup> These are both methods of avoiding a North Korean designation for Kaesong goods.

For countries that have not entered into FTAs with South Korea, KIC goods follow the nonpreferential rules of origin. China, for example, announced that goods produced in the KIC would be treated as South Korean goods.<sup>23</sup> Since China has not entered into an FTA with South Korea, nonpreferential rules of origin apply. But origin determinations under these rules are ambiguous; the WTO’s determinations have been subject to various

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16. Agreement on Rules of Origin, Apr. 15, 1994, 1868 U.N.T.S. 397.

17. John Coyle, Essay, *Rules of Origin as Instruments of Foreign Economic Policy: An Analysis of the Integrated Sourcing Initiative in the U.S.-Singapore Free Trade Agreement*, 29 YALE J. INT’L L. 545, 550 (2004).

18. Agreement on Rules of Origin, *supra* note 16, art. 1.

19. INT’L TRADE CTR., RULES OF ORIGIN IN EXPORT CREDIT INSURANCE 1 (2000).

20. EUL-CHUL, *supra* note 5, at 189.

21. Kim, *supra* note 2, at 78.

22. *Id.*

23. *China To Recognize Kaesong Goods as Made in S. Korea*, CHOSUN ILBO (Seoul, S. Korea), July 3, 2006, [http://english.chosun.com/site/data/html\\_dir/2006/07/03/2006070361043.html](http://english.chosun.com/site/data/html_dir/2006/07/03/2006070361043.html).

criticisms for their subjectivity and inconsistent outcomes.<sup>24</sup> According to Article II of the Agreement on Rules of Origin, a product is conferred the status of origin where “wholly obtained” or, if multinationally produced, “the country where the last substantial transformation has been carried out.”<sup>25</sup> The WTO has not clearly defined “substantial transformation.” In fact, according to a panel report interpreting Article II of the Agreement on Rules of Origin, members are granted “considerable discretion in designing and applying their rules of origin” until the harmonization of the rules is completed.<sup>26</sup>

It seems that it will be difficult for KIC products to qualify as South Korean goods under Article II of the Rules of Origin.<sup>27</sup> First, KIC goods, by definition, cannot possibly be “wholly obtained” in South Korea. Second, they are unlikely to meet the standards of the proposed ways of ascertaining “substantial transformation.” The general principle largely accepted is to grant origin status to the place where the “last substantial process” took place.<sup>28</sup> Three alternative methods further define substantial transformation: a “domestic content test,” which enumerates the degree of transformation necessary to confer origin to the good; a “technical test,” which confers origin to the product if the product undergoes a specific processing procedure; and the “change in tariff classification” method, which determines rules of origin based on changes in tariff classification.<sup>29</sup> While the majority of the products from the KIC are shipped to South Korea before being exported, no material transformation goes into the goods after they are produced in the KIC. Despite the large degree of discretion granted by the rules of origin in the transitional period, granting origin status to a country that simply served as an intermediary merchant seems to defy any common understanding of “substantial transformation.”

On the other hand, arguments can be made for conferring South Korean origin status on goods produced in the KIC due to the unique nature of the special economic zone. First, South Korea plays a large role in supplying the inputs used in production. The South Korean government, for example, chose Korea Electric Power Corporation (KEPCO) as the electricity provider for the KIC. KEPCO provides to the KIC fifteen thousand kilowatts per hour of South Korean electricity.<sup>30</sup> More importantly, KIC companies bring all resources—sand, gravel, and agricultural goods—from South Korea, as North Korea is not providing any raw materials.<sup>31</sup> All these factors could allow some KIC goods to fail the WTO rules, depending on how much transformation actually occurs in North Korea.

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24. See N. David Palmeter, *The U.S. Rules of Origin Proposal to GATT: Monotheism or Polytheism?*, J. WORLD TRADE, Apr. 1990, at 36.

25. Agreement on Rules of Origin, *supra* note 16.

26. Panel Report, *United States—Rules of Origin for Textiles and Apparel Products*, WT/DS243/R (June 20, 2003) [hereinafter WTO Panel Report].

27. This would mean that the Chinese policy of treating KIC goods as South Korean goods could be in violation of WTO rules.

28. Moshe Hirsche, *Asymmetric Incidence of Rules of Origin*, J. WORLD TRADE, Aug. 1998, at 44.

29. *Id.*

30. EUL-CHUL, *supra* note 5, at 202.

31. *Id.* at 194.

While the origin of KIC products is theoretically debatable, due consideration should be given to whether a WTO challenge will ever take place. Three factors suggest that the KIC origin policies are unlikely to be challenged in the foreseeable future. First, since broad authority is given to the importing country in interpreting the Rules of Origin,<sup>32</sup> WTO members will be wary of litigating an issue that is unlikely to win. Second, even if granting South Korean origin to KIC goods is legally questionable, it conforms to the general WTO principle of reducing trade barriers. Third, countries importing KIC-produced goods will economically benefit from the cheap North Korean labor supply. In calculating the realistic possibility of a WTO challenge, these factors should be weighed against the tendency for governments to use Rules of Origin as a tool for protectionism and against the deep political concerns that many countries have relating to both human rights violations and the nuclear program in North Korea.<sup>33</sup>

The KIC presents large policy implications for the United States. The development of the KIC has allowed goods produced by North Korean labor unprecedented access to international markets, allowing the regime to secure much-needed foreign currency. This could weaken U.S. leverage in negotiations with North Korea, since the United States has relied heavily on trade sanctions.<sup>34</sup>

The U.S.-South Korea FTA (KORUS FTA), signed in 2007 and awaiting legislative approval in both countries, complicates the issue further. Should the United States approve the KORUS FTA, the WTO preferential rules of origin would govern, displacing default nonpreferential rules of origin. Currently, the language of the KORUS FTA denies goods produced in the KIC duty free status, although the two states have set up a committee that will consider whether KIC goods will be deemed goods originating in South Korea.<sup>35</sup> Special rules used in past U.S. FTAs, including Integrated Sourcing Initiatives, Outward Processing, and Qualifying Industrial Zone regimes, could influence the committee in its KIC deliberations.<sup>36</sup> Since trade sanctions have been the primary tool for U.S. leverage over North Korea, this committee could serve as an important instrument for inducing political change in North Korea.

The U.S. government needs to weigh multiple issues in considering whether to treat KIC goods as South Korean goods. On the one hand, the rise of the KIC will increase North Korea's access to foreign funds, which could be used to continue its nuclear program and fuel the authoritarian regime. On the other hand, improvement in North Korea's foreign funds supply could reduce the tendency of North Korea to sell weapons to international terrorist

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32. WTO Panel Report, *supra* note 26.

33. See MICHAEL E. O'HANLON & MIKE MOCHIZUKI, CRISIS ON THE KOREAN PENINSULA: HOW TO DEAL WITH A NUCLEAR NORTH KOREA 2 (2003) (proposing an agenda that will address the "acute nuclear weapon crisis" and "human rights issues").

34. See Franklin L. Lavin, *Asphyxiation or Oxygen? The Sanctions Dilemma*, FOREIGN POL'Y, Fall 1996, at 138, 151 (discussing various ways in which the United States could impose or lift sanctions to induce certain behavior by the North Korean government).

35. Suk Hi Kim, *The Korea-U.S. Free Trade Agreement of April 1, 2007, and Kaseong Industrial Complex*, 3 N. KOREAN REV. 119, 126 (2007).

36. See Kim, *supra* note 2, at 75.

organizations for fast foreign currency.<sup>37</sup> As Michael E. O'Hanlon and Mike Mochizuki have argued, such economic improvement would be an important piece in discouraging the regime's "extortionist behavior."<sup>38</sup> Moreover, increased access to foreign currency could be used to alleviate domestic food shortage by facilitating the import of more food. The KIC could also serve as an important starting point for North Korean economic integration that could induce a political shift in the region.

The KIC represents a new avenue for the international community to deal with North Korea. WTO Rules of Origin play an extremely important role here because if KIC goods are treated as South Korean goods, North Korea is presented with the opportunity to bypass high tariff barriers that previously made its products prohibitively expensive for international consumers. The WTO Rules of Origin appear to permit a policy treating KIC goods as South Korean goods for those states that have bilateral trade agreements with South Korea (assuming that they include specific provisions to that effect), but the issue remains complicated for states that do not have such agreements with South Korea. This has large implications for the United States, because acceleration of North Korea's access to international markets could undermine U.S. leverage over the authoritarian regime. We argue that the United States should be carefully attuned to the new challenges and opportunities that the KIC presents in developing further policy decisions toward North Korea and the pending KORUS FTA.

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37. See O'HANLON & MOCHIZUKI, *supra* note 33, at 4 ("Pushing North Korea to the brink may also increase the odds that it will sell plutonium to the highest bidder to rescue its economy."); see also Daniel A. Pinkston & Phillip C. Saunders, *Seeing North Korea Clearly*, 45 SURVIVAL 79, 89 (2003) (discussing President Bush's 2002 State of the Union Address, in which the President suggested that North Korea might provide terrorist groups with weapons of mass destruction).

38. See O'HANLON & MOCHIZUKI, *supra* note 33, at 4.

## The Rise (and Fall?) of Defamation of Religions. By Lorenz Langer

In the autumn of 2009, the controversy over the Muhammad cartoons<sup>1</sup> reached Yale University. The decision by Yale University Press to remove not only the reproduction of the Danish drawings, but also *any* depiction of the prophet from an upcoming book on the cartoons<sup>2</sup> drew angry comments from several quarters.<sup>3</sup> Defenders of free speech clashed with those demanding consideration for Muslim feelings, as well as those worried about a potentially violent response to the cartoons.<sup>4</sup>

This latest episode in the cartoon saga shows that the balance between freedom of expression and the protection of religious sensitivities is still elusive. Whether reprinted by the Press or not, the cartoons are now in the public domain, where they will provide a ready means to cause offense for decades to come. Adherents of a religion might be more hurt by insults to their faith than by (penalized) libel of their own person. Yet making religions (or their interpreters) the arbiter over what may be said would impose considerable constraints on public discourse.

Discussion about the limits of speech can be framed in moral, religious, legal, or political terms, or a combination thereof.<sup>5</sup> When the Muslim world took offence at Salman Rushdie's novel *The Satanic Verses*, the response was almost exclusively religious, with Ayatollah Ruhollah Khomeini's *fatwa* as the sad apogee.<sup>6</sup> The Danish cartoons sparked violence,<sup>7</sup> but also court proceedings in national, regional, and international fora. The reaction of Muslim governments was couched in legal terms instead of religious condemnation: from the outset, elites in Muslim states relied on international law and human rights norms to denounce defamation of religions as a violation of human dignity.<sup>8</sup> They also insisted that the international legal framework addressing the balance between freedom of expression and protection of religion was deficient, claiming that it did not sufficiently

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1. The cartoons first appeared in Flemming Rose, *Muhammeds Ansigt* [The Face of Muhammed], JYLLANDS-POSTEN, Sept. 30, 2005, at 3 (Den.).

2. JYTTE KLAUSEN, THE CARTOONS THAT SHOOK THE WORLD (2009).

3. Patricia Cohen, *PEN Makes Appeal to Yale Press*, N.Y. TIMES, Sept. 12, 2009, at C2; Mona Eltahawy, *Yale's Misguided Retreat*, WASH. POST, Aug. 29, 2009, at A15.

4. See Marcia Inhorn, *A Major Form of Blasphemy*, YALE ALUMNI MAG., Sept. 9, 2009, available at [http://www.yalealumnimagazine.com/issues/2009\\_11/yup\\_inhorn057.html](http://www.yalealumnimagazine.com/issues/2009_11/yup_inhorn057.html); John Negroponte, *A Risk of "Violence of an Unpredictable Nature,"* YALE ALUMNI MAG., Sept. 9, 2009, <http://www.yalealumnimagazine.com/extras/yup/negroponte149.html>; Michael Steinberg, *Light and Truth and a Free Press*, YALE ALUMNI MAG., Sept. 9, 2009, available at <http://www.yalealumnimagazine.com/extras/yup/steinberg149.html>.

5. The lines between these different types of discussions can often be difficult to draw. Swearing, for instance, is morally frowned upon, but can also lead to religious sanctions, see *Exodus* 20:7; *Leviticus* 20:9, 24:10-16, or legal sanctions, see *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). The Sedition Act used legal means for political ends. Act of July 14, 1798, ch. 74, 1 Stat. 596.

6. For an overview, see THE RUSHDIE FILE (Lisa Appignanesi & Sara Maitland eds., 1990). Legal proceedings under blasphemy laws did take place in the United Kingdom, see *R v. Chief Metropolitan Stipendiary Magistrate, Ex parte Choudhury*, [1991] 1 Q.B. 429, with an unsuccessful appeal to the European Commission of Human Rights, see *Choudhury v. United Kingdom*, App. No. 17439/90, 12 HUM. RTS. L.J. 172, 172-73 (1991).

7. For a detailed account, see KLAUSEN, *supra* note 2.

8. See Letter from Ahmed Aboul Gheit, Minister of Foreign Affairs of Egypt, to the U.N. Sec'y-Gen., U.N. Doc. A/60/566 (Nov. 23, 2005).

safeguard religious feelings, that its implementation was ridden with double standards, and that it therefore needed to be complemented with provisions banning defamation of religions outright. This view is consistent with the abortive attempts by Muslim associations to obtain a ruling on the cartoons in an international forum; however, both the European Court of Human Rights and the Committee on Human Rights dismissed the respective applications on procedural grounds.<sup>9</sup>

This Recent Development retraces the demands for protecting religions from offense and the attempts to initiate the drafting of new legal instruments to ensure such protection. While several international human rights conventions contain provisions that address freedom of religion, there is no instrument that exclusively focuses on religion or its protection. Efforts to draft a convention against religious intolerance date back to the 1960s, but resulted only in the nonbinding 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>10</sup> The Declaration was directed against discrimination of individuals by "any State, institution, group of persons or person on the grounds of religion or belief."<sup>11</sup> In contrast, the broader concept of "defamation of religions" raised by the cartoons controversy encompasses the creed itself. This concept made its first appearance before the cartoons, when Pakistan, on behalf of the Organization of the Islamic Conference (OIC), introduced a draft resolution on combating "[d]efamation of Islam" in the U.N. Human Rights Commission in 1999.<sup>12</sup> The resolution was to counter "new manifestations of intolerance and misunderstanding, not to say hatred, of Islam and Muslims," and to oppose portrayals of Islam as a religion hostile to human rights.<sup>13</sup>

Suggestions by some Commission members to broaden the scope to other religions were first resisted by an insistence that "the problem faced by Islam was of a very special nature."<sup>14</sup> After protracted haggling, however, Pakistan introduced a revised draft resolution which encompassed religions in general while still emphasizing the particularly vulnerable situation of Islam. This second draft was adopted by the Commission without a vote.<sup>15</sup> The resolution's operative part expressed concern about "negative stereotyping of religions"<sup>16</sup> and about "any role in which the print, audio-visual or electronic media or any other means is used to incite acts of violence, xenophobia or

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9. Human Rights Comm., Decision: Communication No. 1487/2006, U.N. Doc. CCPR/C/92/D/1487/2006 (Apr. 18, 2008); Ben El Mahi v. Denmark, App. No. 5853/06 (Eur. Ct. H.R. Dec. 11, 2006), <http://www.echr.coe.int/echr>.

10. G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 5, 1981).

11. *Id.* art. 2, para. 1.

12. Comm'n on Human Rights, *Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, U.N. Doc. E/CN.4/1999/L.40 (Apr. 20, 1999). Pakistan had been repeatedly criticized for its own blasphemy laws. *See, e.g.*, Comm'n on Human Rights, Sub-comm'n on Prevention of Discrimination and Protection of Minorities, 50th Sess., 23d mtg. ¶¶ 45-48, U.N. Doc. E/CN.4/Sub.2/1998/SR.23 (Aug. 21, 1998).

13. Comm'n on Human Rights, 55th Sess., 61st mtg. ¶ 1, U.N. Doc. E/CN.4/1999/SR.61 (Oct. 19, 1999).

14. *Id.* ¶ 7.

15. Comm'n on Human Rights Res. 1999/82, 55th Sess., 62d mtg. U.N. Doc. E/CN.4/Res/1999/82 (Apr. 30, 1999).

16. *Id.* art. 1.

related intolerance and discrimination towards Islam and any other religion.”<sup>17</sup> Under this formulation, the objects of protection are Islam and other religions, rather than individual adherents of religions. In international law, discrimination on racial, ethnic, or religious grounds, however, is generally understood to be directed against persons or groups of persons.<sup>18</sup> The resolution did not elaborate on how the same concept could be applied to religions, beliefs, or ideologies, or who would decide when a religion had been defamed.

The Commission adopted a similar resolution by consensus in 2000, after several draft resolutions and amendments, and protracted discussion<sup>19</sup> with the European Union urging the sponsors not to raise the issue again in the Commission.<sup>20</sup> Unperturbed, Pakistan introduced another draft resolution in 2001.<sup>21</sup> This time, however, consensus proved elusive. The Belgian representative, speaking on behalf of the EU, criticized the OIC for protecting religions rather than the rights of individuals.<sup>22</sup> Nevertheless, the resolution was adopted.<sup>23</sup> The Commission also voted on resolutions on defamation of religions in 2002,<sup>24</sup> 2003,<sup>25</sup> 2004,<sup>26</sup> and 2005.<sup>27</sup>

Thus, defamation of religions and Islamophobia figured prominently on the international agenda of Muslim states even prior to the publication of the cartoons in September 2005. At that stage, no claims for additional legal instruments were being made, and the issue was receiving a muted institutional response within the United Nations<sup>28</sup> and little news coverage. Once the cartoons were published, the campaign against defamation of religions and Islamophobia garnered greater attention and was raised in

17. *Id.* art. 3.

18. International Convention on the Elimination of All Forms of Racial Discrimination art. 1, para. 1, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 212; Comm. on the Elimination of Racial Discrimination, *General Recommendation Concerning Article 1 of the Convention*, ¶ 1, U.N. Doc. A/54/18(Supp.), Annex V (Aug. 27, 1999).

19. Comm’n on Human Rights, 56th Sess., 67th mtg. ¶¶ 72-73, U.N. Doc. E/CN.4/2000/SR.67 (Dec. 1, 2000) [hereinafter Record of the 67th Meeting]; Comm’n on Human Rights, Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, 56th Sess., U.N. Doc. E/CN.4/2000/L.18 (Apr. 10, 2000); Comm’n on Human Rights, Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, 56th Sess., U.N. Doc. E/CN.4/2000/L.96 (Apr. 20, 2000); Comm’n on Human Rights, Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, 56th Sess., U.N. Doc. E/CN.4/2000/L.6 (Apr. 5, 2000).

20. Record of the 67th Meeting, *supra* note 19, ¶ 75.

21. Comm’n on Human Rights, *Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, U.N. Doc. E/CN.4/2001/L.7 (Apr. 11, 2001).

22. Comm’n on Human Rights, 57th Sess., 61st mtg. ¶¶ 4-6, U.N. Doc. E/CN.4/2001/SR.61 (Dec. 4, 2001).

23. All European countries on the Commission as well as Canada, Japan, and the United States voted against. *Id.* ¶ 10.

24. Comm’n on Human Rights Res. 2002/9, U.N. Doc. E/CN.4/Res/2002/9 (Apr. 15, 2002).

25. Comm’n on Human Rights Res. 2003/4, U.N. Doc. E/CN.4/Res/2003/4 (Apr. 14, 2003).

26. Comm’n on Human Rights Res. 2004/6, U.N. Doc. E/CN.4/Res/2004/6 (Apr. 8, 2004).

27. Comm’n on Human Rights Res. 2005/3, U.N. Doc. E/CN.4/Res/2005/3 (Apr. 12, 2005).

28. See, e.g., U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Civil and Political Rights, Including Religious Intolerance*, U.N. Doc. E/CN.4/2001/63 (Feb. 13, 2001) (prepared by Abdelfattah Amor). Special Rapporteur on Racism Doudou Diène had some sympathy for the claims of defamation, but concluded that a stricter implementation of existing norms was needed. ECOSOC, Comm’n on Human Rights, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, at 2, U.N. Doc. E/CN.4/2003/23 (Jan. 3, 2003).

additional fora. Yemen introduced a resolution condemning defamation of religions in the U.N. General Assembly, which was adopted in a vote split along the trenches established by the previous votes in the Commission on Human Rights.<sup>29</sup> The OIC held an Extraordinary Islamic Summit session in Mecca in December 2005 to address the defamation campaigns against Muslims and Islam itself. The assembled head of states expressed "concern at rising hatred against Islam and Muslims and condemned the recent incident of desecration of the image of the Holy Prophet Mohammad (PBUH) in the media of certain countries" and emphasized "the inapplicability of using the freedom of expression as a pretext to defame religions."<sup>30</sup>

Over the next four years, defamation of religion was a constant topic at international and regional meetings. The newly established Human Rights Council decided at its first session to request reports on defamation of religions by the Special Rapporteur on Freedom of Religion, by the Special Rapporteur on Contemporary Forms of Racism, and by the High Commissioner for Human Rights.<sup>31</sup> The reports were to focus on the implications of defamation under Article 20(2) of the International Covenant on Civil and Political Rights, which requires states party to prohibit by law any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence.<sup>32</sup> The reports, however, were cautious about subsuming defamation under Article 20(2).<sup>33</sup>

Representatives of Muslim countries therefore felt justified in insisting on stronger remedies, suggesting that the Human Rights Council draft "a legally binding instrument to combat defamation of religions and uphold respect for religions and beliefs."<sup>34</sup> The OIC Summit conference in 2008 declared all acts "which defame Islam as heinous acts that require punishment."<sup>35</sup> The OIC authorized its Secretary-General to constitute a group of experts to draft "a legally-binding international instrument to promote respect for all religions and cultural values and prevent discrimination and instigation of hatred vis-à-vis the followers of any religion."<sup>36</sup>

At the same time, the OIC continued to press the issue of defamation at the United Nations. Both the General Assembly and the Human Rights

29. G.A. Res. 60/150, 60th Sess., 64th mtg., U.N. Doc. A/RES/60/150 (Dec. 16, 2005).

30. Organization of the Islamic Conference [OIC], Final Communiqué of the Third Extraordinary Session of the Islamic Summit Conference, at II (Dec. 7-8, 2005), available at <http://www.oic-oci.org/ex-summit/english/fc-exsumm-en.htm>.

31. Human Rights Council Dec. 1/107, 24th mtg., U.N. Doc. A/DEC/1/107 (Nov. 13, 2006).

32. International Covenant on Civil and Political Rights art. 20(2), entered into force Mar. 23, 1976, 999 U.N.T.S. 171.

33. Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* ¶ 47, U.N. Doc. A/HRC/2/3 (Sept. 20, 2006) (prepared by Asma Jahangir & Doudou Diène); High Comm'r for Human Rights, Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council,"* ¶¶ 19, 22, U.N. Doc. A/HRC/2/6 (Sept. 20, 2006).

34. Human Rights Council, 2d Sess., 9th mtg. ¶¶ 24, 31, U.N. Doc. A/HRC/2/SR.9 (Oct. 25, 2006).

35. OIC, *Final Communiqué of the Eleventh Session of the Islamic Summit Conference*, ¶ 176, OIC Doc. OIC/SUMMIT-11/2008/FC/Final (Mar. 13-14, 2008).

36. *Id.* ¶ 177.



Council passed resolutions in 2007 and 2008.<sup>37</sup> The OIC and the Groups of Arab and African States also amended the resolution extending the mandate of the Special Rapporteur on Freedom of Expression to cover “instances in which the abuse of the right of freedom of expression constitutes an act of racial or religious discrimination.”<sup>38</sup> The concept of defamation of religions, now seemingly established on the international level, figured prominently on the agenda of NGOs<sup>39</sup> and was reported by the media.<sup>40</sup>

Proponents of defamation hoped to further entrench and codify the concept at the U.N. Durban Review Conference scheduled for 2009.<sup>41</sup> The 2001 World Conference against Racism in Durban had not addressed the issue of religious defamation, but the Durban Programme of Action had recommended preparing complementary international standards to strengthen international instruments against racism, racial discrimination, xenophobia, and related intolerance.<sup>42</sup> To this end, the Council convened a group of experts to analyze the gaps in existing international instruments and to deliberate on the adoption of additional protocols or new conventions.<sup>43</sup> An ad hoc committee of Council members was then to implement their findings.<sup>44</sup> When the experts concluded that current legal instruments sufficiently covered the combination of religious intolerance and racial prejudices,<sup>45</sup> they were chastised by Muslim member states for disregarding their mandate.<sup>46</sup>

This was arguably the high point of the push for international defamation law. In March 2009, an extensive version of the obligatory resolution was passed by the Council.<sup>47</sup> Western countries feared and Muslim

37. G.A. Res. 62/154, U.N. Doc. A/RES/62/154 (Dec. 18, 2007); G.A. Res. 63/171, U.N. Doc. A/RES/63/171 (Dec. 18, 2008); Human Rights Council Res. 7/19, 40th mtg., U.N. Doc. A/HRC/Res/7/19 (Mar. 28, 2008); Human Rights Council Res. 4/9, 31st mtg., U.N. Doc. A/HRC/Res/4/9 (Mar. 30, 2007).

38. Human Rights Council Res. 7/36, art. 4(d), 42d mtg., U.N. Doc. A/HRC/RES/7/36 (Mar. 28, 2008).

39. Human Rights Council, *Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Follow-Up and Implementation of the Durban Declaration and Programme of Action*, U.N. Doc. A/HRC/10/NGO/69 (Feb. 26, 2009) (joint written statement submitted by Freedom House & the Beckett Fund for Religious Liberty); Human Rights Council, *Promotional Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/9/NGO/15 (Aug. 29, 2008) (joint written statement submitted by ARTICLE 19 (The International Centre Against Censorship) & the Cairo Institute for Human Rights Studies).

40. See, e.g., *Bad Counsel*, ECONOMIST, Apr. 4, 2007, at 58-59 (referring to the 2007 defamation resolution as “new”); *Zwischen Meinungsfreiheit und Hassreden: Der Uno-Menschenrechtsrat debattiert über Religion [Between Freedom of Expression and Hate Speech: The UN Human Rights Council Debates Religion]*, NEUE ZÜRCHER ZEITUNG, Sept. 28, 2006, at 7.

41. G.A. Res. 61/149, U.N. Doc. A/RES/61/149 (Dec. 19, 2006).

42. World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, S. Afr., Aug. 31-Sept. 8, 2001, *Report*, at 71, ¶ 199, U.N. Doc. A/CONF.189/12 (2001).

43. Human Rights Council Res. 1/5, ¶ 2, 24th mtg., U.N. Doc. A/HRC/RES/1/5 (June 30, 2006).

44. Human Rights Council Dec. 3/103, 3d mtg., U.N. Doc. A/HRC/DEC/3/103 (Apr. 23, 2007).

45. Human Rights Council, Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action, *Complementary International Standards*, ¶ 130, U.N. Doc. A/HRC/4/WG.3/6 (Aug. 27, 2007).

46. Human Rights Council, *Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination*, ¶¶ 23, 41, 42, U.N. Doc. A/HRC/10/88 (Feb. 24, 2009).

47. Human Rights Council Res. 10/22, 10th Sess., U.N. Doc. A/HRC/RES/10/22 (Mar. 26, 2009).

countries hoped that the Durban Review Conference would see a decade of promoting religious defamation rewarded by the initiation of codification.<sup>48</sup> Yet “defamation of religions” did not feature at all in the outcome document of the Review Conference, despite Muslim states’ insistence on the importance and validity of the concept.<sup>49</sup> Instead, the document underscored the paramount importance of freedom of expression.<sup>50</sup> At the Review Conference, the Special Rapporteur on Freedom of Expression had stated that it was “crucial” to remove defamation from the final outcome document.<sup>51</sup> Eventually, the OIC accommodated the Western states’ insistence on omitting defamation.<sup>52</sup> Clearly, this came as a surprise.<sup>53</sup> As late as October 2008, the proposals for the outcome document of the Review Conference had still made numerous references to defamation and demanded new normative standards.<sup>54</sup>

For some time after the Review Conference, defamation all but vanished from the international agenda. The 11th and 12th sessions of the Human Rights Council did not pass resolutions on defamation, but instead adopted a compromise resolution on freedom of expression co-sponsored by Egypt and the United States.<sup>55</sup> The end of defamation of religion seemed to be imminent.<sup>56</sup> While the OIC still pushed to draw up new legal instruments,<sup>57</sup> the momentum on the international level seemed lost. Even if the OIC itself adopted a new legal instrument, the effect would be limited since the organization primarily takes issue with the treatment of Muslims in non-Muslim states. It would seem that the representatives of OIC member states were somewhat flushed with their influence in U.N. bodies. In the flood of resolutions they overlooked that U.N. rapporteurs and experts consistently argued against the need for new legal standards.

It is too soon to say whether this indicates the waning of defamation.

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48. Neil MacFarquahr, *Concerns Keep U.S. from Talks on Racism*, N.Y. TIMES, Apr. 20, 2009, at A7.

49. Press Release, Durban Review Conference, Afternoon, at 2, U.N. Doc. RC/09/3 Rev.1 (Apr. 20, 2009), [http://www.un.org/durbanreview2009/coverage/pdf/20.04.09\\_meeting\\_summary\\_pm\\_rev1\\_en.pdf](http://www.un.org/durbanreview2009/coverage/pdf/20.04.09_meeting_summary_pm_rev1_en.pdf) [hereinafter Durban Conference April 20 Afternoon]; Press Release, Durban Review Conference, Morning, at 2, 6, U.N. Doc. RC/09/4 (Apr. 21, 2009), [http://www.un.org/durbanreview2009/coverage/pdf/21.04.09\\_meeting\\_summary\\_am\\_en.pdf](http://www.un.org/durbanreview2009/coverage/pdf/21.04.09_meeting_summary_am_en.pdf).

50. Durban Review Conference, Geneva, Switz., Apr. 20-24, 2009, *Report*, at 6-7, ¶¶ 54, 58, U.N. Doc. A/CONF.211/8 (2009).

51. Press Release, Durban Review Conference, Afternoon, at 5, U.N. Doc. RC/09/11 Rev.1 (Apr. 23, 2009), [http://www.un.org/durbanreview2009/coverage/pdf/23.04.09\\_meeting\\_summary\\_pm\\_rev1\\_en.pdf](http://www.un.org/durbanreview2009/coverage/pdf/23.04.09_meeting_summary_pm_rev1_en.pdf).

52. Durban Conference April 20 Afternoon, *supra* note 49, at 3, 9; Closing Statement of the High Commissioner for Human Rights (Apr. 24, 2009), <http://www.un.org/durbanreview2009/stmt05-01-09.shtml>.

53. See, e.g., *Avoiding the Worst: UN Conference on Racism*, ECONOMIST, Apr. 25, 2009, at 62-63.

54. Preparatory Comm. for Durban Review Conference, *Implementation of the Mandate of the Working Group*, ¶ 46, U.N. Doc. A/CONF.211/PC/WG.2/CRP.1 Annex (Oct. 27, 2008).

55. Human Rights Council Res. 12/16, 12th Sess., U.N. Doc. A/HRC/RES/12/16 (Oct. 2, 2009).

56. ARTICLE 19, UN Human Rights Council: Beginning of the End for Defamation of Religion? (Sept. 23, 2009), <http://www.article19.org/pdfs/press/un-human-rights-council-beginning-of-the-end-for-defamation-of-religions-.pdf>.

57. The working group to that end is still not established. OIC, Council of Foreign Ministers, *Combating Islamophobia and Eliminating Hatred and Prejudice Against Islam*, ¶ 10, Res. 34/36-POL (May 23-25, 2009).

The OIC might well decide that the domestic benefits of passing annual resolutions in the Human Rights Council outweigh the cost of antagonizing the Western states. Muslim members of the Ad Hoc Committee continue to insist that new legal instruments are indispensable.<sup>58</sup> New efforts are underway to pass another resolution on defamation in the General Assembly in 2010 with a view to drafting a binding instrument.<sup>59</sup> Suddenly, defamation of religions seems to be well and alive again.

But repetitive resolutions without result would underscore that nothing beyond grandstanding can be achieved. Even if a new international instrument or additional protocol were eventually to emerge at the United Nations, it is unlikely that Western governments would feel compelled to become a party to it. While indicating that they were not unsympathetic to complaints of discrimination against Muslims, European regional institutions have also made it clear that they do not see the prohibition of defamation of religions as a viable solution to such grievances.<sup>60</sup>

Defamation of religions will be with us for some time to come. But its proponents have yet to provide a convincing rationale why—and especially how—religions rather than individuals should be protected from insult or discrimination. The mere fact that some Muslim countries impose severe penalties for blasphemy cannot warrant a ban on the international level.<sup>61</sup> Nor is it clear who would authoritatively decide when a transgression has occurred; courts would be ill-equipped to adjudicate religious commands. The emancipation of the public sphere from control by religious authorities is too important an achievement to be jeopardized by a vague, novel concept.

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58. Human Rights Council, Ad Hoc Comm. on the Elaboration of Complementary Standards, *Outcome Referred to in Paragraph 2(D) of the Road Map on the Elaboration of Complementary Standards*, U.N. Doc. A/HRC/AC.1/2/2 (Aug. 26, 2009).

59. Frank Jordans, *Islamic Nations Pressing UN Panel for Treaty That Would Ban Blasphemy*, ASSOCIATED PRESS, Nov. 20, 2009, at 7.

60. See Eur. Parl. Ass., Recommendation 1805, *Blasphemy, Religious Insults and Hate Speech Against Persons on Grounds of Their Religions* (2007), <http://assembly.coe.int/main.asp?link=/Documents/AdoptedText/ta07/EREC1805.htm>; see also European Comm'n for Democracy Through Law, *Report on the Relationship Between Freedom of Expression and Freedom of Religion*, ¶ 64, Doc. No. CDL-AD(2008)026 (Oct. 23, 2008).

61. See Inhorn, *supra* note 4.

